STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH BERTIN,

Plaintiff-Appellee,

vs

DOUGLAS MANN,

Defendant-Appellant.

Supreme Court No. 155266
Court of Appeals No. 328885
LC Case No: 14-139901-NO
(Oakland County Circuit Court)

/

BENDURE & THOMAS, PLC
BY: MARK R. BENDURE (P23490)
15450 E. Jefferson Ave., Suite 110
Grosse Pointe Park, MI 48230
(313) 961-1525
Appellate Attorneys for Plaintiff-Appellee

LAW OFFICES OF KELMAN & FANTICH
BRIAN L. FANTICH (P60935)
30903 Northwestern Hwy., Ste. 270
Farmington Hills, MI 48334
(248) 855-0100
Attorneys for Plaintiff

SECREST WARDLE
SIDNEY A. KLINGLER (P40862)
2600 Troy Center Dr., POB 5025
Troy, MI 48007-5025
(248) 539-2859
Attorneys for Defendant-Appellant

/

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

CERTIFICATE OF SERVICE

STATEMENT REGARDING JURISDICTION

Plaintiff acknowledges that MCR 7.303(B)(1) confers on this Court the discretion to "review by appeal a case pending in the Court of Appeals or after decision of the Court of Appeals". As the Application was filed within the 42 day period of MCR 7.305(C(2), this Court has the jurisdiction, in its discretion, to review the Court of Appeals decision challenged by Defendant in his Application for Leave to Appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

I. DO THIS CASE, AND THE SUMMARY DISPOSITION ARGUMENT PRESENTED, WARRANT PRE - TRIAL SUPREME COURT REVIEW?

Plaintiff-Appellee answers: "NO"

II. SHOULD LEAVE TO APPEAL BE DENIED, AS THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF, WHO WAS STRUCK BY AN ELECTRIC CART DRIVEN BY ANOTHER GOLFER, COULD RECOVER FOR THE NEGLIGENT OPERATION OF THE GOLF CART AND WAS NOT REQUIRED TO PROVE "RECKLESS MISCONDUCT"?

Plaintiff-Appellee answers: "YES"

COUNTER-STATEMENT OF FACTS

Introduction

At about noon on May 22, 2013, Plaintiff Kenneth Bertin ("Plaintiff" or "Bertin") and Defendant Douglas Mann ("Defendant" or "Mann") were golfing at Farmington Hills Golf Club. Inattentive to where he was going, Mann drove a motorized golf cart into Bertin, who was walking, then accidently ran the cart over Plaintiff's ankle as he fell to the ground. Bertin suffered three ankle fractures and related damages for which he seeks civil redress.

The Circuit Court ruled that Plaintiff could not recover for ordinary negligence, just for reckless misconduct. That decision was based on the common law rule created in Ritchie-Gamester v City of Berkley, 461 Mich 73 (1999) regarding injuries sustained in the course of recreational activities. According to the trial court, the risk of being run over by a motorized vehicle is one of the "inherent risks" of golf which Plaintiff assumed by engaging in that activity.

The Court of Appeals reversed (Ex. 1). In its Opinion (Judges Gadola, Fort Hood and Riordan), the Court concluded that getting struck by a negligently operated golf cart is not an "inherent risk" of the game of golf (Ex. 1, pp. 8-12), a game that was played for centuries before motorized golf carts even existed.

Defendant now seeks Supreme Court review.

Factual Background

The factual background comes from the trial testimony of Plaintiff and Defendant, the only two known witnesses to the injury-causing event.[1] Except for differing accounts about how Mann struck Bertin with the golf cart, the background evidence is not disputed.

Mr. Bertin, 69 years old at the time of trial, is a financial planner and insurance agent who also officiates at high school sporting events (Tr. 7/14/15, pp. 160-161). He served in the military during the Vietnam conflict, and has been a golfer since about 1970 (Tr. 7/14/15, pp. 162-163).

Mr. Mann, 88 years old at the time of trial, had been an avid golfer since he was 11 years old (Tr. 7/14/15, pp. 259, 262, 294), and had played on his high school golf team (Tr. 7/14/15, p. 294). When Defendant began, golf carts did not even exist (Tr. 7/14/15, p. 299). He no longer walks the course while playing (Tr. 7/14/15, p. 295).

Bertin and Mann were both members of a senior men's golf league at Farmington Hills Golf Club (Tr. 7/14/15, p. 167). The format entailed assigning different partners each week to play a match against two opponents who had been

[1] The trial judge had already ruled that "reckless misconduct" was required (Mot. 5/13/15, pp. 14-15) (Ex. 3), so the testimony at trial was shaped by that ruling. The testimony of the parties is found in the transcript of trial proceedings conducted on July 14, 2015 ("Tr. 7/14/15"). The remainder of the trial testimony was addressed to damages. Due to the verdict on the issue of reckless misconduct, the jury never reached the question of damages, so that aspect of the case does not bear on the legal issue presented on appeal.

assigned to each other. As a result, the groupings changed weekly (Tr. 7/14/15, pp. 203, 296). Plaintiff recalled playing with Defendant about 3 times (Tr. 7/14/15, pp. 201-202).

On May 22nd or 23rd, 2013 (different dates are used), Bertin and Mann were paired as partners (Tr., 7/14/15, p. 167). They used an electric golf cart instead of walking (Tr., 7/14/15, pp. 298, 307). They started the round at the 10th hole and completed the first seven holes uneventfully, with Bertin doing almost all the driving (Tr. 7/14/15, p. 167).

By about noon, they reached the 17th hole, where the injury occurred (Tr. 7/14/15, pp. 167, 169, 261). Both hit drives in the fairway, and Bertin drove to the area of the balls (Tr. 7/14/15, pp. 209, 301). With their approach shots to the green, the two advanced near the green with Bertin driving. By the time Plaintiff was injured, Mann's ball was on the green while Plaintiff's ball was to the right of the green (Tr. 7/14/15, p. 169). From that point on, the parties differ in their accounts.

Plaintiff testified that Defendant got out of the cart and hit his shot to within 3 to 5 feet of the hole (Tr. 7/14/15, p. 169). Defendant walked back to the cart and put his club away, then got in the passenger seat as they drove to the area of Plaintiff's ball (Tr. 7/14/15, pp. 170, 220). The cart was parked about 15 feet from

Plaintiff's ball, to the side and to the rear (Tr. 7/14/15, p. 170, 211). Plaintiff got out of the cart with a putter and wedge and walked from the cart to his ball.

Bertin's shot rolled through the green (Tr. 7/14/15, p. 171). He began to walk toward where his ball had landed, carrying his two clubs (Id.). As he walked 10 or 15 feet at an ordinary pace toward his ball, he was unexpectedly struck from behind by the cart, which Mann was driving (Tr. 7/14/15, pp. 171-172).

As Plaintiff was struck from behind, the cart hit him in the buttocks area, knocking him forward to the ground (Tr. 7/14/15, p. 172). He was then struck a second time as the cart ran over his leg, breaking his ankle in three places (Tr. 7/14/15, pp. 172, 180). Mann then proceeded to finish his round (Tr. 7/14/15, p. 177).

Bertin directly refuted Mann's claim that he had darted in front of the cart. He did not step in front of the cart, which would entail walking back toward the tee.

Plaintiff explained why he did not regard being run over by a golf cart driven by his partner as an anticipated risk of golf (Tr. 7/14/15, pp. 168-169):

> "Q. When you decided to get in the golf cart, is this a motorized vehicle?
>
> A. It is.
>
> Q. Okay. And do you essentially follow the rules of the road as you would any normal motorized vehicle.

A. Yes.

Q. Okay. And what are those rules of the road that you would follow when... you were driving the golf cart from hole ten to about the sixteenth? Go ahead.

A. To be aware of your surroundings, making sure that you don't run into another golfer or anything like that obviously. To try and stay out of ditches and stay out of water hazards and things like that. That's what you're doing while you're driving the golf cart.

* * *

Q. Okay. Do you agree with the statement that operating machinery and a vehicle such as a golf cart and being struck by a golf cart on a golf course is – is – is – is a risk of that activity of golfing?

A. Not up until then, no.

Q. Why not.

A. Because usually the drivers of the golf carts are aware of their surroundings as well and you watch out for them."

As Mann recalled, Plaintiff was to the right and slightly behind the cart when he hit his shot and Mann took over the driver's seat (Tr. 7/14/15, pp. 273-274). Defendant believed the cart struck Plaintiff on the lower leg, not buttocks, and denied running Plaintiff's leg over with the cart (Tr. 7/14/15, pp. 271, 282). While admitting that he did not see Bertin before striking him with the vehicle (Tr. 7/14/15, pp. 279, 305), Mann claimed that Bertin unexpectedly walked in front of

the cart, while Defendant was driving the cart to the other side of the green, toward the 18th tee, "the minute I hit the accelerator he was in front of it" (Tr. 7/14/15, p. 302). Defendant claimed that, "the car moved just a few inches" before it struck Plaintiff (Tr. 7/14/15, p. 279).

The Course of Litigation

During the course of the pre-trial proceedings, a dispute arose regarding the proper liability standard. Plaintiff advocated the ordinary negligence standard used in motor vehicle-caused injury cases. Defendant argued that Plaintiff was required to prove reckless misconduct to prevail since the parties were co-participants in the round of golf. At the conclusion of a hearing held May 13, 2015 (transcript attached as Ex. 3), the Court ruled (Tr. 5/13/15, pp. 14-15):

> "... I find that the issue of whether or not the game of golf and the use of a golf cart in the game of golf entitles defendant to the reckless negligence standard. And the Court finds that it does fit that standard in the sense that it is involved with the game of golf.
>
> Off road vehicles, though not all of them, they all could be under the motor vehicle statute, driven on roads and some of them are, as some Jeeps are off road vehicles and are driven on the roads also. Golf carts are not allowed on roads. They're not - - they're not licensed, they don't have a license, they don't - - they don't qualify under the Motor Vehicle Code. So the Court will give the reckless negligence standard with respect to negligence."

At the commencement of trial, Plaintiff unsuccessfully urged the Court to re-examine that ruling (Tr. 7/14/15, pp. 3-4). Understandably, the basic theme of the defense was that Mann's conduct, even if negligent, did not constitute the reckless conduct needed for recovery under the trial court's ruling.

At the end of the trial, in accord with the pre-trial ruling, the court instructed the jury that Plaintiff could not prevail unless he proved reckless misconduct (Tr. 7/16/15, p. 69):

> "Your verdict will be for the plaintiff if he was injured or damaged and the defendant acted with reckless misconduct and such reckless was a proximate cause of the plaintiff's injuries or damages. Your verdict will be for the defendant if plaintiff was not injured or damaged or if the defendant did not act with reckless misconduct, but such conduct was not a proximate cause of the injuries or damages."

Judge Anderson had previously explained (Tr. 7/16/15, pp. 67-68):

> "When people participate in a sport or recreational activity the law presumes that the participants consent to the ordinary risks involved with that activity. Co-participants in a recreational activity owe each other a duty not to act with reckless misconduct.
>
> Conduct within the range of ordinary activity involved in the sport or activity is not reckless. The recklessness standard requires that the defendant's actions demonstrate a willingness or

> purposeful indifference to the injury of the co-participant."

After receiving these instructions, the jury returned its verdict for Defendant (Tr. 7/16/15, pp. 78-79). It found that Defendant did not engage in reckless misconduct (Id.). Judgment was then entered for Defendant (Ex. 2).

Plaintiff then appealed to the Court of Appeals, which released its published decision (Ex. 1) on December 27, 2016. After reviewing the background, the panel concluded that, while a golf cart might be a "motor vehicle" as defined in the motor vehicle code, the owner's liability statute of that code, MCL 257.401(1), did not apply (Ex. 1, pp. 3-7).

Turning to the heart of the matter, the Court looked to the definition of "inherent risk" (Ex. 1, pp. 8-9). It noted that golf carts are a recent invention (Ex. 1, p. 10), and that the Rules of Golf are silent on whether walking is required (Ex. 1, p. 10). Ultimately, the Court held:

> "Accordingly, in light of (1) the United States Supreme Court's observations in Martin, (2) the fact that golf carts are not referenced as an inherent component of golf in the current USGA Rules of Golf, and (3) the fact that there is no evidence in the instant case that the golf course where the accident occurred required the use of golf carts, we conclude that risks related to golf carts are not inherent risks of the game of golf. Just as walking is not an essential attribute of golf itself, Martin,

532 US at 685, using a golf cart is not a fundamental or inherent characteristic of golf. Rather, golf carts are a convenience, which—when used during a game of golf on a golf course—make traversing a golf course, and transporting equipment, less strenuous, and they have no basis in, or relationship to, the underlying activity or rules of golf, principally swinging a club in the attempt to strike a ball." (Ex. 1, p. 11, footnotes omitted).

* * *

Therefore, we conclude that risks related to golf carts are not risks inherent in the game of golf, as the sport of golf would exist and remain virtually unchanged in the absence of golf carts. Cf. Schmitz, 170 Mich App at 696; Yoneda, 110 Hawaii at 376. Accordingly, the trial court erred in ruling that a reckless misconduct standard of care applies in this case." (Ex. 1, p. 12).

ARGUMENT

I. THIS CASE, AND THE SUMMARY DISPOSITION ARGUMENT PRESENTED, DO NOT WARRANT PRE-TRIAL SUPREME COURT REVIEW

Defendant complains about the ultimate outcome of the Court of Appeals decision, a trial on the issue of whether he was negligent in breaking Plaintiff's ankle. Apart from the legal merit, he pays scant attention to the primary inquiry of any Application for Leave: whether the issue is of such novelty and statewide significance that the considered decision of a fair and thoughtful Court of Appeals panel is not enough, that Supreme Court review is required. Defendant's Application falls flat on that score.

There is no real dispute as to the controlling legal standards. A Defendant can escape accountability for negligently injuring a co-participant only when the injury was an "inherent risk" of the activity. The issue in this case is fact-specific in a unique context. In no other reported Michigan case has a golfer driven a motorized cart into another golfer with injurious results.

To be sure, the facts of this case are interesting and the details perhaps fascinating to golfers. Still, outcomes in this area of law are driven by unique facts. The Circuit Court, then the Court of Appeals, are the judicial strata for weighing evidence. Appeals such as this are uniquely ill-suited to Supreme Court

review. As this Court explained in People v Tyrer, 385 Mich 484 (1970), dismissing the appeal because leave was improvidently granted:

> "If a bi-level appellate system is to work, it is necessary for the Supreme Court to resist the temptation, always present among men trained in the law, to become involved in the fascinating work of the trial and intermediate appellate courts."

In addition, there is no "final judgment", just a ruling that calls for a trial. The demands on Justices to perform administrative responsibilities, decide motions, decide Applications, attend oral arguments and write scholarly Opinions, and the finite resources of this Court, help define the limited judicial energies left for cases seeking pre-trial review. To grant leave to appeal in any interlocutory matter is *ispo facto* to reduce the quantity or quality of justice afforded to those appealing from final judgments. Simply as a matter of allocating precious judicial resources, those resources must ordinarily be directed toward final judgments rather than interlocutory orders.

Adherence to the practice ordinarily requiring a final judgment before appellate review helps keep the appellate docket manageable. If, for example, the parties come to realize that it is in their best interests to resolve their differences, there will never be any need for this Court to decide the issue which Defendant now seeks to present. Likewise, if Defendant were to prevail at trial, there would be no need for him to pursue an appeal. It would be improvident to commit the

already sorely-taxed resources of this State's highest Court to a case which may proceed to a satisfactory resolution if the parties are left alone.

If this Court were to grant leave to appeal to review the "inherent risk" ruling, it would not avoid the possibility that all the other issues of the case, including those which develop during trial, will again be presented to the Court of Appeals and this Court after final judgment. Judicial efficiency is far better served by review of all issues at one time rather than repeated piecemeal decisions.

Against this array of reasons why leave should be denied, Defendant offers no real claim that he will sustain substantial harm by awaiting a post-judgment appeal of right except that the Court of Appeals ruling allows the case to continue. That is hardly noteworthy, as every denial of a dismissal motion allows the case to proceed. A trial on the substantive merits is exactly what our system of justice strives to offer. The prospect of a decision on the merits is a far cry from "substantial harm".

The fact that the decision below requires a defense to the claim of negligence at trial leaves Defendant in no different position than that of any other movant that loses one of the dismissal motions decided every week across the State. That is scarcely a basis for Supreme Court review.

Defendant rests his Application on the supposition that the Court of Appeals decision disturbed virgin soil when it interpreted and applied the "inherent risk"

test to this case. If this were so, it would only show that "inherent risk" is an inquiry which hinges on the unique facts of particular cases, a ruling that has little if any application beyond the facts of this case. And, it would show that the meaning of "inherent risk" is sufficiently well settled as to present no blazing controversy. The appellate court's performance of its error-correction function in a fact-specific decision presents no issue warranting extraordinary Supreme Court review.

In sum, the Application presents no compelling reason for extraordinary Supreme Court review. The Application should be denied for that reason.

II. LEAVE TO APPEAL SHOULD BE DENIED, AS THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF, WHO WAS STRUCK BY AN ELECTRIC CART DRIVEN BY ANOTHER GOLFER, COULD RECOVER FOR THE NEGLIGENT OPERATION OF THE GOLF CART AND WAS NOT REQUIRED TO PROVE "RECKLESS MISCONDUCT"

In Ritchie-Gamester v City of Berkley, 461 Mich 73 (1999), this Court considered whether a cause of action existed when the plaintiff was injured while ice skating. The injury occurred during an "open skating period" when the 12 year old defendant, skating backward, unintentionally collided with the plaintiff (461 Mich at 75). The common law defense created by the Supreme Court in Ritchie-

Gamester was the basis for the ruling of the trial judge and in turn the Court of Appeals.

In Ritchie-Gamester, the Court began by explaining (461 Mich at 79), "Participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game". As a policy reason for restricting recovery (461 Mich at 84-85):

> "Courts have recognized that a fear of litigation could alter the nature of recreational activities and sports: 'Fear of civil liability stemming from negligent acts occurring in the athletic event could curtail the proper fervor with which the game should be played and discourage individual participation...'
>
> One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play - - a traditional source of a community's conviviality and cohesion - - spurs litigation. The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough and tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms" (citations omitted).

The Ritchie-Gamester Court based its decision on concerns that the inherent contact of a sport, if actionable under a negligence standard, would transform a violation of sporting rules, essentially a penalty under the rules of the sport, into an actionable tort (461 Mich at 85):

> "If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted. When the number of athletic events taking place... over the course of a year is considered, there exists the potential for a surfeit of lawsuits when it becomes known that simple negligence, based on an inadvertent violation of a contest rule, will suffice as a ground for recovery for an athletic injury. This should not be encouraged."

The rule eventually adopted in Ritchie-Gamester was thought to be akin to the now abolished "assumption of risk" doctrine, or a sort of implied contract between the participants. As the Court reasoned, "when people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity" (461 Mich at 87). On that basis, the Court adopted the doctrine which the trial judge applied in this case: co-participants in a recreational activity may not recover for negligence by a co-participant causing injury resulting from an inherent risk of the activity. The application of that doctrine is the focus of this appeal.

A. The Applicable Standards Of Review

The ruling of the trial judge amounts to a summary disposition ruling that Plaintiff's action for negligence may not be maintained. By that decision, the issue of whether Defendant was engaged in reckless misconduct was deemed a question

of fact for the jury, but not the question of whether the injury arose from an inherent risk of golf. To the extent that the ruling is regarded as a summary disposition under MCR 2.116(C)(10), it is reviewed de novo on appeal. Spiek v Dept. of Transportation, 456 Mich 331, 339 (1998); Ardt v Titan Insurance Co., 233 Mich App 685, 688 (1999); Maskery v U of M Board of Regents, 468 Mich 609, 613 (2003); Walsh v Taylor, 263 Mich App 618, 621 (2004).

For that purpose, the facts and all reasonable inferences are viewed favorably to the non-movant. Sniecinski v Blue Cross, 469 Mich 124, 131 (2003); Forge v Smith, 458 Mich 198, 204 (1998); Weymers v Khera, 454 Mich 639, 640-647 (1997); Bertrand v Alan Ford, Inc., 449 Mich 606, 617-618 (1995); Thomas v Stubbs, 218 Mich App 46, 49 (1996); Hill v GMAC, 207 Mich App 504, 506-607 (1994).

The meaning and applicability of the defense to a negligence claim present issues of law which are reviewed de novo. Burba v Burba, 461 Mich 637, 647 (2000); Cardinal Mooney High School v MHSAA, 437 Mich 75, 80 (1991).

B. The Court of Appeals Decision Is Substantively Correct Because Getting Run Over By A Negligently Driven Golf Cart Is Not An "Inherent Risk" Of The Game Of Golf

The Court of Appeals decision does not require Supreme Court review. It is based on the specific application of an established legal principle to unique facts, so unique that no other Michigan reported case presents the question. Not only does the issue lack broad application, the Court of Appeals got it right.

To determine the meaning of "inherent risk", the Court of Appeals looked to dictionaries defining the phrase. As the Court observed, a risk is "inherent" if it is "necessarily entailed in a given activity", "involved in the constitution or essential character of something", "a permanent and inseparable element" (Ex. 1, p. 8). Since golf has been played for centuries without motorized golf carts, and motorized golf carts are not implements essential to the very nature of the game - in contrast to clubs and balls - - the Court recognized that the risk of being run over is not an "inherent risk" of the game of golf. In doing so, it noted that other courts considering the issue reached the same conclusion (Ex. 1, pp. 11-13, fn 12).

Since motorized golf cart collisions are not an "inherent risk" of golf under the ordinary definition of that phrase, Defendant challenges the appellate court's use of the quoted definitions (Application, pp. 6, 9). In his view, the fact that motorized golf carts are found on most golf course is enough (Id.). There is nothing leaveworthy, or even fairly debatable, about the Court of Appeals adopting the primary definition of "inherent risk". The very term "inherent" means an essential aspect of the game itself.

Under this definition, there is nothing "inherent" in the game of golf that entails the risk of being struck by a negligently operated golf cart.[2] The game consists of striking a golf ball (of narrowly limited size and composition) with a golf club (of dimensions and composition also narrowly limited). One cannot play the game without clubs or balls. As the Court of Appeals correctly observed, in PGA Tour, Inc v Martin, 532 US 661 (2001), the United States Supreme Court found that use of a golf cart is not a fundamental part of the game itself (Ex. 1, p. 9-11). Stated differently, there is nothing about use of a motorized golf cart that is inherent in the nature of the game.

History bears this out. For many centuries, long before the United States even existed, and even longer before the gas or electric motor was invented, the sport was played in Scotland on foot. Over the intervening hundreds of years, golf clubs were carried by a caddie, or slung across the golfer's shoulder, or hauled by a pull cart. Golf has done very well without motorized carts.

Indeed, at the highest levels of golf, participants are required to walk and forbidden from using a motorized cart. Martin, supra.

---

[2] It is inherent in the game of golf to swing the club. For that reason, injuries sustained when accidentally struck by a club swing by another may require reckless misconduct for recovery. Blakney v Dery, Ct. of App. # 296017, rel'd 2/24/11. However, the Ritchie-Gamester limitation does not preclude a negligence action arising out of vehicular negligence or use of equipment that is not a required implement of the sport itself.

In other parts of the world, golf clubs are carried on the backs of a llama or camel. By Defendant's logic, the risk of being bit by a llama would be regarded as an "inherent risk" of golf simply because the animal is customarily used to assist the golfer.

Defendant also seeks to substitute the word "foreseeable" for "inherent". He suggests that the ability to foresee an injury makes that risk "inherent". Thus, the argument goes, one who golfs has assented to being run over by a negligently operated golf cart (or, for that matter, a drunkenly driven golf cart, since golfers have been known to enjoy a beer on the course) because that is "foreseeable" (Application, pp. 10-11). That is not what Ritchie-Gamester says. It enacts a higher standard only for injuries resulting from "inherent risks", not from those arising from "foreseeable risks".

Defendant also refers the Court to the Ski Area Safety Act, MCL 408.321 et. seq., which contains a broad description of injurious ground conditions and structures that are statutorily described as part of skiing (Application, pp. 11-13). Again, Defendant misses the mark.

This case does not involve skiing or the risk of "collisions with ski lift towers".[3] It is not even governed by legislation at all. In fact, unlike the case with skiing, the Legislature has not enacted any statutes at all regarding golf safety. If there is a lesson to be learned, it is that the Legislature has chosen not to restrict liability for injuries on the golf course as it has for ski injuries.

The Court of Appeals cited law review articles and other authorities holding golf cart drivers to a "negligence" standard of care (Ex. 1, pp. 11-13, fn. 12). The Court quoted at length from Forman v Kreps, 50 NE3d 1 (Ohio App 2016), a factually indistinguishable case where the plaintiff was struck by a golf cart operated by another golfer (Ex. 1, p. 12). To repeat:

> "Although many golfers use motorized golf carts, a motorized golf cart, unlike a golf ball or club, is not incidental to the game of golf. As such, because a golf cart is not an actual part of the sport of golf, appellant had no reason to assume that he would be struck and injured by a golf cart since it is not an ordinary risk of the game. The incident at issue does not involve conduct that is foreseeable, customary part of the sport of golf. Thus, a negligence standard should have been applied."

* * *

[3] It bears mention that even under MCL 408.342, risks involved in skiing only limit liability dangers that are "necessary". Since motorized golf carts are not "necessary" to the sport, just like they are not "inherent", the Ski Area Safety Act does not advance Defendant's argument.

> "As the nonuse of a cart does not prevent a person from engaging in golf – while the nonuse of a ball or club would – it cannot be considered an inherent part of the game. As such, the risk of being injured by a golf cart does not become an ordinary and foreseeable risk."

Arrayed against this body of law, Defendant cites Wooten v Caesar's Riverboat Casino, 63 NE3d 1069 (Ind. App. 2016) and Valverde v Great Expectations, LLC, 15 NYS 3d 329; 131 App Div 3d 425 (2015). The Court of Appeals decision is not inconsistent with either of these.

Valverde was decided under New York's "assumption of the risk" doctrine. In Michigan, "assumption of the risk" has been consigned to the garbage dump of "no longer the law" for more than fifty years, from Felgner v Anderson, 375 Mich 23, 32-56; 133 NW 2d 136 (1965) forward.

In Wooten, one golf cart struck a different cart, not a golfer walking to his ball. In that case, the plaintiff admitted that it was common and expected for a golf cart to hit another. Regardless of whether Wooten and his fellows commonly used golf carts as amusement park bumper cars, that does not change that fact that driving into another golfer is not an "inherent risk", as the sister state cases on point such as Forman show.

In sum, motorized golf carts are not an "inherent" feature of golf. They have only been used at all for a small percentage of the time the game has been played.

C. The Court of Appeals Decision Reaches The Correct Result For The Alternative Reason That The *Ritchie-Gamester* Doctrine Does Not Apply To Injuries Caused By Motor Vehicles

There is an additional reason why a "negligence" standard applies: under Ritchie-Gamester, that is the standard for cases arising from negligent operation for motor vehicles. While the Court of Appeals did not adopt this analysis (Ex. 1, pp. 5-7), an appellee may present alternative grounds for reaching the same result. Middlebrooks v Wayne County, 446 Mich 151, 166, fn. 41; 521 NW2d 774 (1994); Cacevic v Simplimatic Engineering Co, 467 Mich 997; 625 NW2d 784 (2001).

The issue of negligence liability for vehicular injuries was described by the Court's published decision in Van Guilder v Collier, 248 Mich App 633 (2001). In that case, both parties were driving four wheel off-road vehicles ("ORVs"), when defendant drove his ORV into the plaintiff's, unintentionally knocking plaintiff to the ground, then running over him. The trial court granted summary disposition, citing Ritchie-Gamester for the proposition that no recovery could be had for negligence. The Court of Appeals noted that the Motor Vehicle Code applied, and allowed recovery for negligent operation of a motor vehicle (248 Mich App at 636-637), finding the Ritchie-Gamester doctrine inapplicable:

"[A] person operating a motorized recreation vehicle does not reasonably expect or anticipate the risk of physical contact, nor is such risk an obvious or necessary danger inherent to its normal operation. The Ritchie-Gamester Court did not contemplate injuries that occur as a result of physical contact between two such vehicles. This distinction is dispositive. We decline to adopt defendant's speculative conclusion that our Supreme Court intended that a reckless standard of care apply with regard to the operation of a motorized recreational vehicles simply because they are usually used for recreational purposes. The operation of motor vehicles, including ORVs, is not governed by the 'rules of the game', but by law.

A 'motor vehicle' is defined by the Michigan Vehicle Code (MVC), MCL 257.33, as 'every vehicle that is self-propelled...'. A 'vehicle' is further defined by the MVC as 'every device in, upon, or by which any person or property is or may be transported or drawn upon a highway...' MCL 257.79. An ORV is self-propelled and 'may be transported or drawn upon a highway'; therefore, it is a motor vehicle under the MVC.

Further, this Court has held that ORVs are vehicles to which certain provisions of the MVC apply. See People v O'Neal, 198 Mich App. 118, 120; 497 NW2d 535 (1993). 401(1) of the civil liability act of the MVC, MCL 257.401(1), allows for the imposition of liability for injury caused by ordinary negligence in the operation of a motor vehicle. See Alex v Wildfong, 460 Mich. 10, 16; 594 NW2d 569 (1999). Whether MCL 257.401(1) applies to the operation of an ORV appears to present an issue of first impression; however, we hold that the statute is controlling and imposes a

> negligence, rather than a recklessness, standard of care."

The question was again decided in Allred v Broekhuis, 519 F Supp 2d 693 (WD Mich, 2007), a decision by Judge Bell of the federal district court for the Western District of Michigan. In that case, both parties were operating all-terrain vehicles at a trail designated for use by operators of ORVs. When the defendant's vehicle struck the plaintiff's, Mr. Allred brought a negligence action. Applying Michigan law, Judge Bell rebuffed the Defendant's effort to apply Ritchie-Gamester to injuries caused by a vehicle. The Court followed Van Guilder and explained (519 F Supp 2d at 697):

> "[T]here is no language in Ritchie-Gamester to suggest that the Michigan Supreme Court ever intended the recreational activities doctrine to apply to activities involving motorized vehicles. Before adopting and applying the recreational activities doctrine to the ice-skating accident at issue in Richie-Gamester, the Michigan Supreme Court considered a number of cases involving recreational activities ranging from duck hunting, to amateur hockey, baseball, golf, soccer, tennis, softball, touch football, kick the can, horse racing, and amusement park rides. 461 Mich at 77-87. None of the recreational activities considered in Ritchie-Gamester involved motorized vehicles.
>
> * * *
>
> Defendants have not identified any court cases that have applied the Richie-Gamester recreational activities doctrine or the reckless standard to the

> operation of ORVs or any other motorized recreation vehicles.
>
> * * *
>
> Defendant's arguments for disregarding Van Guilder are creative, but they are not persuasive. In the absence of persuasive data that the Michigan Supreme Court would reject Van Guilder and apply the recreational activities doctrine to ORVs, the Court is not free to disregard the Court of Appeals' decision in Van Guilder. See Meridian, 197 F.3d at 1181. The Court concludes that the Michigan Supreme Court would follow Van Guilder and apply a negligence standard of care to the operation of ORVs."

Unpublished cases have likewise held the "recreational activities" doctrine to injuries involving motor vehicles. Gaggo (injury arising from ride on a moped); Ball v Dewey, Ct. of App. #223122, rel'd 7/9/02 (Ex. 4), p. 11 (Ritchie-Gamester inapplicable to automobile negligence cases).

Like the ORV in Van Guilder, the golf cart in this case meets the statutory definition of "motor vehicle" in MCL 257.33, "every vehicle that is self-propelled" and in MCL 257.79, a "device...upon... which any person or property is or may be transported or driven upon a highway."[4] Whether or not the Motor Vehicle Code applies to injuries through the off-road use of a golf cart, the facts remains that it is

[4] In retirement or gated communities, especially with a golf course running through the sub-division, like those found in Arizona or Florida, it is commonplace for residents to use golf carts on the local roads.

a "motor vehicle" to which a "negligence" standard has traditionally applied, as in Van Guilder.

RELIEF SOUGHT

WHEREFORE, Plaintiff Kenneth Bertin prays that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully Submitted,

BENDURE & THOMAS, PLC

By: */s/ Mark R. Bendure*
MARK R. BENDURE (P23490)
Counsel for Plaintiff
15450 E. Jefferson, Suite 110
Grosse Pointe Park, MI 48230
(313) 961-1525
bendurelaw@cs.com

Dated: April 19, 2017